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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 267

EUGENE M. JOHNSON, ADMINISTRATOR OF THE ESTATE OF MAX JOHNSON, DECEASED,
Respondent,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI.

(a) OPINIONS OF LOWER COURTS.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, granting summary judgment in favor of the petitioner, is set forth in the transcript of record at R. pp. 18-22 (117 Fed. Supp. 52). The opinion of the Circuit Court of Appeals for the Seventh Circuit, reversing the judgment of the District Court, is set forth at R. pp. 34-38 (212 Fed. (2) 256).

(b) JURISDICTION OF THIS COURT.

Jurisdiction to review this case upon writ of certiorari is conferred upon this court by 28 U. S. C. sec. 1254 (1). The opinion of the Court of Appeals for the 7th Circuit

was filed April 23, 1954. On May 19, 1954, it denied the first petition for rehearing and on June 16, 1954, it denied the second petition for rehearing and this petition for writ of certiorari is applied for within the period allowed by 28 U. S. C. sec. 2101 (c).

(c) QUESTIONS PRESENTED.

Federal jurisdiction in this case was based solely on diversity of citizenship and the matter to be decided was the proper application of the receipt of proof of disability provisions of the insurance policy sued upon to the uncontested facts under Illinois law.

1. In the absence of a case directly in point by a state court, does the determination of state law under *Erie* v. *Tompkins,* etc., require a federal court to search for the "nearest" case which it can find of the court of last resort and then draw all its conclusions from that case or should it make use of all available data with respect to state law and not merely base its opinion on what it believes to be the rationale of one state court case without reference to the total rationale of all available data with respect to the law of a particular state?

2. Under applicable state law may a court find an ambiguity in a contract by contrasting implications of intent made after reading part way through a contract with unambiguous intent when the contract is read in its entirety?

3. Does the well-known rule that ambiguities will be resolved against the drafter of a policy or contract, a rule applicable in all jurisdictions, permit a federal court under applicable state law to adopt an interpretation of a policy or contract which is neither favorable to insureds nor to the insurer and which is entirely foreign to the intent of the parties when the policy or contract is read in its entirety?

4. Did the Circuit Court of Appeals use a proper approach to the problem of determination of state law by use of available persuasive data where there was no opinion of either the court of last resort or of an intermediate court of the governing state law which was directly in point?

5. Did the Circuit Court of Appeals give effect to the applicable state law rules which govern the construction of all contracts when it determined that the policy or contract sued upon was ambiguous?

6. If the Circuit Court of Appeals had been guided by the applicable persuasive data with respect to what was the applicable state law, would it not have been bound to reach a different conclusion than the one which it did reach?

REASON RELIED ON FOR ALLOWANCE OF WRIT.

Certiorari should be allowed in this case to review the application of the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. The happy result of *Erie etc.* v. *Tompkins* was uniformity of laws to be administered in the Federal and State courts in diversity of citizenship cases. It should not be lost. It has not proved enough that this Court has announced the principle governing cases coming into the federal courts only because of diversity of citizenship and involving questions only of state law. The principle is that it is the duty of the federal courts to ascertain and follow the state law. This cannot be done by taking the "nearest" case of the court of last resort of the state and drawing all inferences of state law from that one case. This can only be done by recognition of the fact that the court of last resort of the state court will make use of its own rules of construction of contracts and not reach a conclusion which is completely indefensible from the viewpoint of the plain, ordinary and popular sense of the words

used in the contract interpreted in its entirety. Otherwise uniformity in the laws to be administered would be lost.

Where a state court opinion in another case has gone the limit to find an ambiguity under a different form of policy, it is not proper judicial procedure for the federal court to go one step farther and thus arrive at an entirely indefensible result under the common sense rules of construction of contracts, recognized in the state jurisdiction involved.

The Seventh Circuit Court of Appeals has decided an important state question in a way in conflict with applicable state law with respect to (1) the plain, ordinary and popular sense of words used in contracts and (2) intent determined by interpretation of a contract in its entirety.

When a federal court or any court has to construe a contract which has never been before a court of review before, the proper approach is to first read the contract and determine what the intent of the parties was from the plain, ordinary sense of the language of the contract read in its entirety with the basic idea applied to insurance contracts that if there are two reasonable interpretations that the one most favorable to the coverage will be adopted but also with the equally basic idea that the court will not adopt a construction which distorts the meaning and says that there is one of two reasonable interpretations when in fact there is but one.

The Court of Appeals did not and could not have followed this procedure and have reached the result which it did reach.

Inadequate review was given by the Court of Appeals to applicable state court law and a specific state court decision (*Mosby* v. *Mutual Life, etc.*, 405 Ill. 599), which involved a different policy, was emphasized by the Court of Appeals to a point that a result was reached which

could only have been reasonably reached under the terms of the particular policy involved in such other case and could not be applied to the policy sued upon without deprivation of the rights of the parties thereunder.

(d) NO CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS INVOLVED.

(e) STATEMENT OF THE CASE.

NATURE OF ACTION: Petitioner, effective December 30, 1930, issued a policy of life insurance on the life of one Max Johnson for $10,000 with a total and permanent disability clause which provided for $100 a month and waiver of premium, subject to notice of claim and receipt of proof provisions. The basis for federal jurisdiction in the first instance was Tit. 28 U. S. C. para. 1441 which provides for removal of any civil action of which the district courts have original jurisdiction (Tit. 28 U. S. C. para. 1332) where the defendant was not a citizen of the state in which the action was brought. The action was brought in the Circuit Court of Cook County, Illinois, and removed by defendant to the federal court (R. 3-5).

Allegedly, by the complaint, the insured, Max Johnson, became totally and permanently disabled on January 1, 1944, but didn't give notice of claim until May 4, 1950 (R. 15). Also, it is undisputed that proofs of disability were not furnished until May 26, 1950 (R. 16).

The insured died on May 19, 1951, and this suit is by the administrator of his estate for disability benefits from May 4, 1949 to May 19, 1951 (R. 9).

By its answer (R. 10, 11, 12) defendant denied (1) that the total disability of the insured for which the plaintiff sues began before December 30, 1945, the anniversary of

the policy nearest insured's rated-up age 60 and further denied (2) that defendant received due proof of any such disability within 1 year from December 30, 1945, the anniversary of the policy on which insured's rated-up age was 60, pursuant to the requirement of the policy sued upon which provided:

> "Due proof of claim must be received * * * in any event not later than one year from the anniversary of the policy on which the insured's rated-up age at nearest birthday is 60 * * * otherwise the claim shall be invalid."

How the Case Was Decided: On the complaint, answer and uncontroverted affidavits filed by petitioner, the petitioner moved the court for a summary judgment on its above stated second defense, namely, its denial that it had received due proof of disability within 1 year from December 30, 1945, the anniversary of the policy on which insured's rated-up age was 60. Inasmuch as it was undisputed that such proof had not been received prior to December 30, 1945, and that in fact more than four years had elapsed from that date before the insured submitted proof of his alleged disability, the District Court granted defendant's motion for summary judgment (R. 23). The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause for trial on the issue of insured's disability and with the "receipt of due proof of disability" issue eliminated (R. 34-39).

Under date of December 30, 1930, the insured, Max Johnson, applied for the insurance sued upon at Chicago, Illinois. In his application he stated that he was an executive with title of Vice-President of the Consumers Gas & Oil Co. with its place of business in Chicago, Illinois, and that he was born in Poland on December 12, 1894 (R. 30A). Petitioner issued the policy involved at rated-up age 45 instead of at insured's actual age of 36 (R. 30A). It was is-

sued on the ordinary life plan and provided for an annual premium of $467.10 payable on December 30th of each year, which included $61.60 for the disability benefits, by the terms of which the insurer agreed that:

> "* * * upon receipt of due proof that the insured is totally and presumably permanently disabled before rated-up age 60, the company agrees to pay to the insured one hundred dollars each month and to waive payment of premium as provided under 'Total and Permanent Disability'."

The "Total and Permanent Disability" clause of the policy was set forth in full on the second page of the policy (R. 30A) and under the 14-point caption "Total and Permanent Disability" provided:

> "Upon receipt by the Company * * * of due proof, as hereinafter provided, that the Insured has become totally disabled by bodily injury or disease
>
> * * * * *
>
> the Company will grant the following benefits:
>
> "(a) Waiver of Premium.—The Company will waive the payment of each premium falling due after the commencement of such total disability and during its continuance, provided, however, that no premium shall be waived which shall have fallen due more than one year prior to the date of receipt at the Home Office of the Company of written notice of claim, as hereinafter provided.
>
> * * * * *
>
> "(b) Income Payments.—The Company will pay to the Insured the monthly income stated on the first page hereof ($10 per $1,000 of the face of this Policy) for the fourth and each succeeding completed month of such total disability during its continuance, provided, however, that no such monthly payment shall be made * * * for any period more than one year prior to the date of receipt at the Home Office of the Company of written notice of claim.
>
> * * * * *

"Written notice of claim hereunder must be received by the Company at its Home Office during the lifetime and during the continuance of total disability of the Insured.

• • • • •

"Due proof of claim must be received at the Home Office of the Company before the expiration of one year after default in payment of premium and in any event, whether or not there be a default not later than one year from the anniversary of the Policy on which the Insured's rated-up age at nearest birthday is 60 or one year after maturity of the Policy, whichever is the earlier date, otherwise the claim shall be invalid.

• • • • •

"Any premium due on or after the anniversary of the Policy on which the rated-up age of the Insured at nearest birthday is 60 will be reduced by the amount of premium charged for Disability Benefits. * * *"

It is undisputed that an Illinois contract is involved and that no premium was charged or paid for disability benefits on or after the anniversary of the policy at insured's nearest rated-up age of 60 (R. 17) which was December 30, 1945.

No claim was made that insured was insane and thereby excused from performance of receipt of due proof requirements.*

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* It has been held in Illinois that insanity is not an excuse for non-performance of a "receipt of due proof" condition precedent contained in a disability clause of an insurance contract. (1930) *Continental etc.* v. *New York Life Insurance Co.*, 257 Ill. App. 651 (Abst.).

ARGUMENT.

The District Court read the above language of the policy, saw that it was different than the language of the policy contained in the case of *Mosby* v. *Mutual Life, etc.*, 405 Ill. 599, and inasmuch as it was undisputed and uncontroverted that proof of disability had not been furnished the insurer within the time limitation of not later than one year after the age 60 date, granted defendant's motion for summary judgment (R. 18-23). Rule 56 (b) of the Federal Rules of Civil Procedure provides for motions for summary judgment by the defendant in a case where there is no genuine issue of fact with respect to a defense which is determinative.

To arrive at that determination of the case the District Court used a direct approach, viz., (1) it read the contract or policy sued upon which is the sole measure of defendant's liability to the plaintiff and (2) it applied the terms of the policy or contract to the undisputed and uncontradicted facts.

Specifically, this direct approach required the court to read the whole policy insofar as it provided for disability benefits and to recognize that receipt of due proof of disability in the plain, ordinary sense of the words used had to be made in any event not later than one year after the anniversary of the policy at which insured's rated-up age at nearest birthday was 60 and inasmuch as it was admitted on defendant's motion for summary judgment that no such proof was made that this was a case of no liability.

The District Judge was already aware of cases which hold (1) that a contract shall be construed in its entirety and (2) that the words used in an insurance contract, like

that used in other contracts, shall be taken in their plain, ordinary and popular sense.

Read together, the District Judge was able to see without any reference to case law that the intent of the parties under the language of the policy above set forth was that due proof of disability in any event had to be made not later than one year after the age 60 date and otherwise the claim was to be invalid.

There wasn't anything ambiguous about that intent and inasmuch as reasonable provisions with respect to receipt of due proof are enforceable because they allow an insurer a chance to determine its liability when the evidence is available and actuarially determine its costs, the District Court recognized that the case, with no genuine issue of fact on the "receipt of proof" issue, had reached a determinative stage and granted defendant's summary motion.

When the plaintiff cited the case of *Mosby* v. *Mutual Life, etc.*, 405 Ill. 599, the District Court examined that case, saw that it was different in its provisions, and that there was nothing in it to support a claim that the policy or contract involved in this case did not mean what it said.

What the Circuit Court of Appeals Held.

On the contrary, the Circuit Court of Appeals found (1) that under state law there was an ambiguity in the language of the above policy in that it was subject reasonably to two interpretations and (2) that under state law one of such reasonable interpretations was that the requirement that proof of disability must be received in any event not later than one year from age 60, otherwise the claim to be invalid, merely meant that the insurer wasn't liable to start to pay the benefits until it got proof of disability but that if it did get proof of disability after one year from the age 60 date that the claim would *not* be invalid!

Wrong Result From Wrong Approach.

This court will not, we believe, usually take a case merely on the basis of (1) wrong result but (2) where the wrong approach to the problem results in a flagrant lack of uniformity between federal application of state law and state law itself then this court should lend a hand to put the record straight lest under the guise of *Erie, etc.* v. *Tompkins,* now 17 years old, instead of uniformity, non-uniformity is practically achieved in diversity cases.

The Circuit Court of Appeals could only have reached the above result by (1) a wrong approach to the application of state law and (2) a failure to apply the basic rule of contract law that requires contracts to be construed in their entirety. To determine state law the Circuit Court of Appeals took only the case of *Mosby* v. *Mutual, etc.,* 405 Ill. 599, and reasoned from that one state case that inasmuch as the state court of last resort, construing the policy in *that* case, had held that the insurer's obligation in *that* case was to pay from the time proofs of disability were made that it had to reach the same result even though the policies or contracts were essentially different in their notice and receipt of proof requirements. Also by a process of contrasting implications drawn from silence in the contract when half read through with matters expressed in the contract when read in its entirety, the Circuit Court of Appeals was able to find an ambiguity where there was none.

Specifically the 7th Circuit Court of Appeals erred:

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in remanding the case to the District Court for further proceedings not inconsistent with its opinion wherein it was said:

" * * * We think the Illinois Supreme Court would

hold that the defendant was liable on the policy for disability payments from such time as proof is made that the insured was totally and permanently disabled up to Dec. 30, 1945. We must, therefore, hold that it was error to have granted defendant's motion for summary judgment" (R. 38).

3. The Circuit Court of Appeals failed to approach correctly the problem of determination of state law under *Erie, etc.* v. *Tompkins* and thereby failed to determine and apply the state law applicable to this case.

A.

The absence of an Illinois case construing the same policy provisions and applying them to the undisputed facts did not excuse the Circuit Court of Appeals for its failure to determine the intent of the contract on the basis of its entirety and by interpretation of the words used in the contract in accordance with the plain, ordinary and popular sense.

In Illinois Ambiguities Must Be Found from the Entity, Not from Part of the Entity.

The Illinois rule, like that of other jurisdictions, is that a contract shall be construed in its entirety.

In (1873) *Massie* v. *Belford,* 68 Ill. 290, the Illinois Supreme Court stated the applicable rule (p. 291):

> "In the construction of written contracts, it is a well known rule of law that the intention of the parties who made the contract is to be determined from the whole instrument, * * *."

Again the Illinois rule of construction is stated in (1921) *Chicago Home for Girls* v. *Carr,* 300 Ill. 478, at p. 483:

> "A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument * * *."

Also in the insurance case of (1937) *W. & S. Indemnity Co.* v. *Industrial Comm.*, 366 Ill. 240, at p. 242:

> "A policy of insurance is a contract, and established rules of construction apply when an endeavor is made to discover the true intent of the contracting parties as expressed in the language of the policy. Their intentions can only be gathered from the language of the whole instrument."

Read in its entirety, the intent of the parties under the above language of the disability clause is (1) that the insurer shall be entitled to receipt of proof of disability during the disability premium payment period and for one year thereafter and if the company gets such proof during such period, it will go back not more than one year prior to the time notice of claim is made and (2) that notice of claim must be received during the lifetime and continued disability and (3) due proof must in any event be made not later than one year after the age 60 date, otherwise the claim to be invalid, and (4) premium will be reduced at age 60 date in amount paid for disability benefits.

The policy states it better, but, read together, such is the contract. The fact that it is spelled out in orderly paragraphs does not change what it says or entitle a court, charged with its enforcement in accordance with its terms, to change what it says. The 1st page refers the reader to the total and permanent disability clause and the company's only promise is to pay in accordance therewith. There is no inconsistency.

The Circuit Court of Appeals had the task of determination of what the benefits were which were granted in the policy and the terms of the policy which would make disability benefits payable or not payable. It determined that even though no proof of disability was furnished prior to the age 60 date or within 1 year thereafter, that nevertheless when proof was submittted more than 4 years

later that the insurer's obligation was to pay disability benefits from such time as proof was made (R. 38).

Under no circumstances could it be said that such was the agreement. If the proof was submitted before the age 60 date or within the one year period thereafter, then the insurer was obligated to go back not more than 1 year and allow the benefits from 1 year prior to notice of claim. If the proof wasn't received at all during that period, then the insurer had no obligation to pay any benefits. In neither case would the obligation of the insurer be to pay from the date of receipt of proofs and it is literally impossible to read any such intent into the policy.

The cases of *Mosby* v. *Mutual Life Ins. Co.*, 405 Ill. 599, 606; *Smith* v. *Mutual Life Ins. Co. of N. Y.*, 188 Ark. 111, 115, 69 S. W. (2) 874; *Mutual Life Ins. Co. of N. Y.* v. *Smith*, 257 Ky. 709, 720, 79 S. W. (2) 28, 35, relied upon by the Circuit Court of Appeals, held that the "receipt of due proof" clause of *those* policies was ambiguous and could be reasonably construed to have merely fixed the time that insurer should first commence making the monthly payments. The policies involved in those three cases were identical with each other in their "receipt of due proof" provisions but were neither identical nor similar to the "receipt of due proof" form involved in this case (R. 21).

Plain, Ordinary Sense Preferred.

However, to achieve the same result under the language of the policy involved in this case which was reached under the language of the policy involved in the three cases cited in the preceding paragraph, the Circuit Court of Appeals had to pass over (1) not only the Illinois rule that a policy or contract shall be taken as a whole in the determination of its intent but (2) Illinois cases of persuasive character which consistently have held that policies of insurance, like other contracts, shall be understood and interpreted in accordance with their plain, ordinary sense.

In (1945) *Moscov* v. *Mutual Life Ins. Co.*, 387 Ill. 378, at p. 383 the court said:

> "* * * plaintiffs invoke the familiar rule that ambiguous provisions or equivocal expressions whereby an insurer seeks to limit its liability will be construed most strongly against the insurer and liberally in favor of the insured. * * * This canon of construction, however, does not authorize a distortion of language or the exercise of inventive powers for the creation of an ambiguity where none exists. * * * Again, contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense."

The uniformity with which the principles of construction have been relied upon and followed as specifically above stated in the *Moscov* case (387 Ill. 378, 383) shows that the state court would not reach a conclusion on the strength of the *Mosby* case (405 Ill. 599) which it could not reach by application of its principles of construction to the terms of the particular form of policy before it.

Illinois cases which specifically rely upon the principles of Illinois law stated in the *Moscov* case (387 Ill. at p. 383) before and after its decision in the *Mosby* case (405 Ill. 599) are:

(1946) *Zitnik* v. *Burik*, 395 Ill. 182, 186.

(1949) *Dempsey* v. *Nat. Life & Acc. Ins. Co.*, 404 Ill. 423, 426.

(1945) *Blanchard* v. *Jackson, etc.*, 327 Ill. App. 290, 295, 1st Dist.

(1946) *Carter* v. *Nehi Beverage Co.*, 329 Ill. App. 329, 332, 1st Dist.

(1949) *Crutchfield* v. *Continental Assur. Co.*, 336 Ill. App. 411, 415, 4th Dist.

(1950) *Sistler* v. *Ill. Bankers Life Assur. Co.,* 341 Ill. App. 512, 519, 520, 4th Dist.

(1953) *Merchants etc. v. Dubuque etc.,* 200 F. (2) 348, 351, 7th C. C. A.

B.

The requirement that due proof "must" be made in any event not later than one year after the age 60 date puts a reasonable time limit upon the time that an insured has in which to make a claim that he became disabled before the age 60 date. Such clause should not be non-enforceable in the federal court but enforceable in the state court. Such clause enables the insurer (1) to investigate claims during a period that the evidence is apt to be available; (2) avoid fraudulent claims; and (3) actuarially determine the hazards.

Since large insurance companies cannot watch the health and conduct of their policyholders, it is reasonable and needful that the parties, when they make their contracts, specify their agreement concerning the manner and method of proof or notice of disability. Such provisions are uniformly held valid and enforceable.

Applicable state cases consistently have held that where liability for insurance benefits is predicated upon (1) the *fact* of proofs or notice of loss in apt time and manner and (2) upon the *fact* of loss—that such provisions are enforceable.

(1935) *Jabara* v. *The Equitable Life Ass. Soc., etc.,* 280 Ill. App. 147, at p. 149.

(1932) *Steffan* v. *Bankers Life of Iowa,* 267 Ill. App. 248 at 252, 253.

(1925) *Feder* v. *The Midland Cas. Co.,* 316 Ill. 552, at p. 558.

Inherently Ambiguities Must Flow from the Whole Contract.

Other than the fact that contracts must be supported by a *quid pro quo,* the basic idea of contract law is two-fold: (1) that parties can reduce to a legal entity their obligations to each other with respect to a particular subject matter and (2) that the court will enforce such legal entity if occasion arises for its enforcement. If the latter becomes necessary, then inherently a court must construe the entity or interpret it in its entirety or in accordance with all of its four corners. What cannot be done, if we are to have contract law, is to read a portion of the entity and at that point draw implications which are not expressed, and then read the balance of the entity and find an ambiguity based on a contrast between the contract construed as a whole and implications made or drawn after only a portion of the contract has been read. This is what the intermediate federal court did in this case and justified what it did on the basis of one decision of the state court of last resort, passing over the overwhelming number of decisions of state courts which have laid down this basic rule of construction of contract law. The basic rule of construction is that contracts shall be construed as a whole or contracts shall be construed in their entirety. This rule is such an essential part of contract law that without it no jurisdiction could have contract law. Inherently, a contract cannot be split up into parts and remain the same entity. When the intent is clear from the entire contract no ambiguity can be drawn by comparison of that clear intent with the implications gathered from reading only an isolated portion of the contract. (*Wilkin* v. *Citizens Nat. Bank of Paris,* 298 Ill. App. 38, 44.)

The fact is, and we believe the court will recognize it to be basic, that:

> "No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party" (J. Holmes in *Lumber Underwriters* v. *Rife*, 237 U. S. 605, at p. 609).

In (1940) *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, at p. 237, the court said:

> "* * *. State law is to be applied in federal as well as in the state courts and *it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it* * * *." (Emphasis ours.)

Arthur L. Corbin, Professor of Law, Yale Law School, in 50 Yale Journal at p. 771, comments on this quotation from the *West* opinion, written by Mr. Justice Stone, as follows:

> "The Federal Court, like a state court, must determine what the state law is by use of 'all the available data' * * *. Is it not reasonable to believe that they include all the data which the state court itself would be free to use?"

In the absence of a state decision by a court of last resort the determination of state law from available data becomes a matter of informed prophecy which must stem from accepted rules of construction, intermediate court decisions, and all data which raises a justifiable inference or a fair implication. It is not a justifiable inference to draw or a fair implication to make from the facts of the *Mosby* case (405 Ill. 599) that the Supreme Court of Illinois with a different contract to construe *in its entirety* would come to the same conclusion which it reached in the *Mosby* case.

A federal court cannot allow itself to change the law of a state by professing to follow *Erie R., etc.* v. *Tompkins*, 304 U. S. 64. State-created rights would thus be destroyed

and uniformity of law in diversity cases become a legal fiction. It is not enough to allot matters of "procedure" to the federal side and matters of "substance" to the state side. The judicial process requires an evaluation of what is the substantive law by a method which does not draw its conclusions from one case only where there is no decision of the highest state court directly in point but where there are numerous decisions which state the commonly understood rules of construction.

The Circuit Court of Appeals opinion does not rest its conclusion on an appraisal of Illinois law but merely upon one Illinois decision which is demonstrably not in point. The object of *Erie R. Co.* v. *Tompkins* would be thwarted if the federal courts were free to limit themselves to the "nearest" decision whenever the highest court of the state had not spoken.

The wholesome impact of *Erie* v. *Tompkins* should not be allowed to be practically destroyed by a process of selection which the state court itself obviously would not follow in view of the clear and unambiguous terms of the particular contract involved and its own rules of construction of contracts.

If recovery could not be had in the state court it should be denied in the federal court.

If the court will read the terms of the policy involved in this case in their entirety, we believe that it will see that the policy is not subject to two reasonable interpretations and hence that there was no ambiguity to be resolved against the insurer.

Conclusion.

If the Circuit Court of Appeals believed that the *Mosby* case was incorrectly decided, then, in the same manner that Illinois courts other than the Illinois Supreme Court would be constrained to follow such case, it would also have to follow it in a proper case. However, to violate basic state rules of construction to arrive at the intent of a different contract is not to follow it but to repudiate it for the state court of last resort relies upon such basic rules of construction either tacitly or by reference thereto in the determination of all its cases inclusive of the *Mosby* case.

The intent of the policy involved is unambiguous. The insurer was entitled to proof of disability during the disability premium payment period or "in any event" within one year thereafter. Under the sweep of state court common sense rules of construction, no other conclusion could result, and there is no state decision which flouts this dominant intent expressed in the contract.

No federal court should endow itself with the duty or power to upset a contract under the guise of *Erie, etc.* v. *Tompkins* when the intent of the contract is unambiguous and where to hold otherwise would violate inherent principles of construction which have been recognized by an overwhelming number of state court decisions.

The approach of the Circuit Court of Appeals was basically wrong. It should have started with recognition of the fact that the court of last resort had not yet interpreted the particular policy or contract before it and ended with recognition of the fact that the parties must have meant what the contract clearly says.

Erie, etc. v. *Tompkins* decided:

"* * * that a federal court, acquiring jurisdiction be-

> cause of diversity of citizenship should adjudicate controversies as if it were only another state court." (1946) *Vanston Committee* v. *Green,* 329 U. S. 156, 162.

Another state court would not have passed over the obvious intent of the contract for an obscure meaning and another state court would not have confined itself to one decision of the court of last resort which decision was not directly in point. Another state court would not have felt obliged to reach an indefensible conclusion with respect to the intent of the parties expressed in their contract unless the matter was *stare decisis.* Another state court would not have found an ambiguity by the unique process of comparison of implications of intent from silence in the contract after it has been read half through with intent expressly stated when the contract is read in its entirety.

It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls the decision, and ordinarily this court would accept the determination of questions of state laws by the intermediate federal appellate courts and therefore refuse to review such determination. This is the rule save in an exceptional case (*Huddleston* v. *Dwyer,* 322 U. S. 232, 236, 237). But this petition for certiorari evokes the exception for it is a case where the conclusion reached by the intermediate federal court could only have been reached by an incorrect approach to the problem of determination of state law.

In (1953) *Pope* v. *Talbot, Inc.,* 346 U. S. 410, 98 L. Ed. 105, 74 S. C. 202, the court said of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64:

> "That case decided that federal district diversity courts must try state created causes of action in accordance with state laws. This ended a longstanding federal court practice under which the outcome of law suits to enforce state created causes of action often

depended on whether they were tried in a state court house or a federal court house."

A ruling which is directly opposed to well-settled state rules of construction of contracts does violence to the principles of uniformity within a state upon which the *Tompkins* decision is based. The opinion of the intermediate federal court in this case, if allowed to stand, would tend to undermine and make uncertain the validity of contract law in the state court, for inherently an essential to contract law is that contracts will be enforced by the courts in accordance with their terms.

The Circuit Court of Appeals should have gone no farther than the *Mosby* case and yet it had to go farther in this case than the *Mosby* case goes. The result is that it did not follow the applicable state law with respect to the proper interpretation of the policy or contract sued upon in this case.

The point of *Erie, etc.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 8117, 82 L. Ed. 1188, is that state law should control and the decisions have uniformity. This can only be accomplished by a federal court having the same power and duty to avail itself of the persuasive data which constitutes the law of a particular state which the courts of that state have.

The law of a particular state should not be determined from the perspective of only one case particularly where that case is not directly in point. Such a method of determination of state law is in conflict with the common sense rule that a federal court should examine all available data to determine state law. A federal court may believe that a state court reached a decision which it would not have reached. However, such a drastic determination of a case should not be made until the federal court has examined all the available data instead of merely one state court

case. This does not mean that it has to examine cases which sustain basic rules of construction which everyone knows. But it does mean that it must adhere to such basic rules of construction. Specifically, the case of *Mosby* v. *Mutual, etc.*, 405 Ill. 599, should not change the provision of the policy involved in this case from a provision that a claim *would* be invalid unless proof of disability was received in any event not later than one year from the anniversary of the policy on which the insured's rated-up age at nearest birthday was 60 to a provision that the claim would *not* be invalid.

Inasmuch as a state court would not blindly confine itself to one case in its determination of its own law and thereby reach a conclusion which would be indefensible from the viewpoint of its own principles of construction stated in numerous other of its recorded opinions, therefore, it is error for a federal court to follow such judicial process to determine what is the state law in the applicable jurisdiction.

Otherwise, the end result after 17 years of *Erie* v. *Tompkins* will be a set of laws in the federal court which lack uniformity with the applicable state laws in diversity of citizenship cases. Such a federal case should not be allowed to stand until another state court case arises to correct it. It should be corrected in the federal court by the process of direct appeal and, specifically, by allowance of petition for certiorari.

PRAYER.

Petitioner respectfully prays that a writ of certiorari be issued by this honorable court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review a full and complete transcript of the record and proceedings in Case No. 11023 on its docket, entitled

Eugene M. Johnson, Administrator of the Estate of Max Johnson, Deceased, Plaintiff-Appellant, *vs.* New York Life Insurance Company, a corporation, Defendant-Appellee, and that the judgment of the Circuit Court of Appeals in said case may be reversed by this honorable court, and that petitioner may have such other relief in the premises as to this honorable court may seem just.

NEW YORK LIFE INSURANCE COMPANY,
a corporation, *Petitioner,*

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